UNITED STATES OF AMERICA
U.S. DEPARTMENT OF HOMELAND SECURITY
**UNITED STATES COAST GUARD**

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UNITED STATES COAST GUARD
Complainant

vs.

JESSICA RENEE PALMA
Respondent

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Docket Number 2018-0424
Enforcement Activity No. 5759048

# DECISION AND ORDER
**Issued: January 09, 2020**

**By Administrative Law Judge: Honorable George J. Jordan**

**Appearances:**

**LT Nathaniel R. Herring**
**Marine Safety Detachment Ketchikan**
**For the Coast Guard**

**JESSICA RENEE PALMA, Pro se**
**For the Respondent**

## I. BACKGROUND

The United States Coast Guard brought this administrative action under 46 U.S.C. § 46 USC 7703(1)(A) and its underlying regulations at 46 C.F.R. Part 5, seeking to revoke Respondent Jessica Renee Palma's Merchant Mariner Credential (MMC or Credential). On January 3, 2019, the Coast Guard filed a complaint against Respondent, alleging she violated 46 C.F.R. § 4.06–5 by failing to take a required drug test following a serious marine incident aboard the M/V MALASPINA on September 19, 2018. Respondent filed a timely answer, admitting the jurisdictional allegations but denying the factual allegations, and asking for a formal hearing.

On April 30, 2019, I held a hearing in Ketchikan, Alaska. LT Sharyl Pels and LT Nathaniel Herring represented the Coast Guard. Respondent represented herself. Following the hearing, I provided the transcript to both parties and gave them the opportunity to file post-hearing briefs containing proposed findings of fact, proposed conclusions of law, and argument supporting their positions. Both parties filed timely briefs. I have carefully reviewed the entire record in this case, including the testimony, exhibits, applicable statutes, regulations, and case law, and find the allegation of a violation of law or regulation NOT PROVED.

## II. FINDINGS OF FACT

1. Respondent is the holder of a Coast Guard-issued MMC. [Ex. CG-01].

2. Alaska Marine Highway System (AMHS) has employed Respondent since 2013. [CG-04; Tr. at 38-39].

3. AMHS required Respondent to hold an MMC in order to serve in this position. [Tr. at 19-21].

4. AMHS offers drug and alcohol training to new employees, which Respondent completed upon being hired. [Tr. at 22-24].

5. Anthony Karvelas is the operations manager and Designated Employer Representative (DER) at AMHS. [Tr. at 18].

6. Mr. Karvelas is familiar with the orientation given to new employees, including training on the Alaska Maine Highway Drug and Alcohol Policy, and verified that Respondent completed the orientation and training. [Tr. at 22-25; CG-05].

7. Respondent received training on the 2010 version of the policy, which requires crew members who are involved in a serious marine incident to be drug tested within 32 hours of the incident. [Tr. at 33-34].

8. Subsequent revisions, including the May 2018 version in effect at the time of the incident, maintain the same language. [Tr. at 35; CG-05].

9. On September 19, 2018, Respondent served as an oiler aboard the M/V MALASPINA. [Tr. at 19, 21].

10. On September 19, 2018, Respondent slipped on an oily deck plate in the engine room of the M/V MALASPINA and injured her knee. [Tr. at 40, 64].

11. Katherine Gregoratos was the purser on board the M/V MALASPINA on September 19, 2018. [Tr. at 56-57].

12. The standing orders for AMHS pursers are to treat any accident or illness where the person gets off the ship as a potential SMI. [Tr. at 70-71].

13. A crew member informed Ms. Gregoratos that there had been an accident in the engine room and she was needed. [Tr. at 59].

14. When Ms. Gregoratos arrived, the third engineer had gotten Respondent some ice for her knee. [Tr. at 59].

15. They did not move Respondent because they were unsure of the seriousness of her injury. [Tr. at 59].

16. Ms. Gregoratos told Respondent about an orthopedic surgeon in Juneau who she thought was very good, and said Respondent could choose to go there or could be seen at an emergency room. [Tr. at 60].

17. Ms. Gregoratos and Respondent had a discussion about worker's compensation and Ms. Gregoratos took some notes on a small piece of paper and gave it Respondent. [R-A; Tr. at 60].

18. The note mentions calling a clinic for an appointment, calling worker's compensation, giving the doctor the unfit for duty form, and confirming receipt of the unfit for duty form with AMHS dispatch, but it does not mention anything about drug testing. [R-A; Tr. at 77-78].

19. Ms. Gregoratos administered an alcohol test to Respondent, then left the engine room to gather necessary paperwork. [Tr. at 61].

20. Ms. Gregoratos placed Respondent's copy of the alcohol test, blank unfit for duty forms, the injury report for worker's compensation, and the drug screening referral form into a manila envelope. [Tr. at 62].

21. Ms. Gregoratos brought the envelope to Respondent in the ADA van on the car deck, where Respondent had moved in anticipation of leaving the ship. [Tr. at 62-63].

22. Although Ms. Gregoratos assumed Respondent would take a drug test in Juneau before flying home, she did not explicitly direct Respondent to report to a specific testing facility that day. [Tr. at 72-73].

23. Respondent found the drug testing referral form in the manila envelope during her first medical appointment about a week later. [Tr. at 135].

24. After finding the referral, Respondent immediately tried to rectify the situation by providing a urine sample and also by self-referring for a hair follicle test, which shows a 90-day history. [Tr. at 135-136; R-D at 8; R-E].

25. The M/V MALASPINA's master filed a report of marine casualty (CG-2692) on September 19, 2019. [CG-06; Tr. at 40].

## III. DISCUSSION

The purpose of Coast Guard suspension and revocation proceedings is to promote safety at sea. 46 U.S.C. § 7701(a). In furtherance of this goal, Administrative Law Judges (ALJs) have the authority to suspend or revoke Coast Guard-issued credentials or endorsements. See 46 C.F.R. § 5.19(b). These proceedings are conducted under the Administrative Procedure Act (APA), 5 U.S.C. § 551 *et seq*. 46 U.S.C. § 7702(a).

### A. Burden of Proof

Section 7(c) of the APA places the burden of proof on the proponent of a rule or order, unless otherwise provided by statute. In a suspension or revocation hearing, the Coast Guard bears the burden of proof. 33 C.F.R. § 20.702(a). Under the APA, the fact-finder must consider the "whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence" before assessing a sanction. 5 U.S.C. § 556(d). The standard of proof in administrative proceedings is the "preponderance of the evidence" standard, meaning a party must prove that "a fact's existence is more likely than not." Steadman

v. SEC, 450 U.S. 91, 98 (1981); Greenwich Collieries v. Dir., Office of Workers' Comp. Programs, 990 F.2d 730, 736 (3d Cir. 1993); see also Dir., Office of Workers' Comp. Programs v. Greenwich Collieries, 512 U.S. 267 (1994).

**B. Jurisdiction**

Respondent admitted to all jurisdictional elements relating to the allegations. However, the burden of establishing jurisdiction nevertheless remains, as "federal courts have an independent obligation to ensure that they do not exceed the scope of their jurisdiction, and therefore they must raise and decide jurisdictional questions that the parties either overlook or elect not to press." Henderson ex rel. Henderson v. Shinseki, 562 U.S. 428, 434 (2011). See also Appeal Decision 2656 (JORDAN) (holding that even though the respondent admitted the charged offense, an appeal must be granted where jurisdiction is not established).

Since this case involves a violation of marine safety law or regulation, in order to establish jurisdiction the Coast Guard must prove the alleged violation occurred while Respondent was "acting under the authority" of a Merchant Mariner Credential. See 46 U.S.C. § 7703. A vessel employee is considered to be acting under the authority of a credential or endorsement when they are required to hold it by either law or regulation, or by their employer as a condition of employment. 46 C.F.R. §5.57(a).

"Each individual below the grades of officer and staff officer employed on any U.S. flag merchant vessel of 100 GRT or more must possess a valid … MMC issued by the Coast Guard." 46 C.F.R. § 15.401(e). See also 46 U.S.C.A. § 8701. On September 19, 2018, Respondent was serving as a Qualified Member of the Engineering Department in the rating of oiler aboard the Ferry M/V MALASPINA, which displaced 2928 gross tons. She was clearly acting under the authority of a Merchant Mariner Credential.

**C. Violation of Law or Regulation**

The Coast Guard may seek to suspend or revoke a credential if the holder was acting under the authority of the MMC when he or she violated or failed to comply with 46 U.C.C. Subtitle II, a regulation prescribed under that subtitle, or any other law or regulation intended to promote marine safety or protect navigable waters. 46 U.S.C. § 7703(1)(A) and 46 C.F.R. § 5.33. A mariner acts under the authority of an MMC when he or she is required to hold one by law or regulation; or by an employer as a condition for employment. 46 C.F.R. § 5.57(a). See Appeal Decision 2687 (HANSEN) (2010).

The Coast Guard charged Respondent with a violation of 46 C.F.R. § 4.06–5. Under this section, "[a]ny individual engaged or employed on board a vessel who is determined to be directly involved in an [Serious Marine Incident] SMI must provide a blood, breath, saliva, or urine specimen for chemical testing when directed to do so by the marine employer or a law enforcement officer." The statutory authority for this regulation includes 46 U.S.C. §§ 2301, 2303, 6101, and 6301.

General rules for Coast Guard chemical testing are found in 46 C.F.R Part 16. These rules require that "chemical testing of personnel must be conducted as required by this subpart and in accordance with the [DOT] procedures detailed in 49 C.F.R. Part 40." 46 C.F.R. § 20.201(a). Under the relevant section of 49 C.F.R. Part 40, an employee refuses to take a drug test if he or she "(1) Fail[s] to appear for any test … within a reasonable time, as determined by the employer, consistent with applicable DOT agency regulations, after being directed to do so by the employer." 49 C.F.R. § 40.191(a)(1). DOT rules also state, "if you refuse to take a drug test, you incur the consequences specified under DOT agency regulations for a violation of those DOT agency regulations." 49 C.F.R. § 40.191(c). The corresponding Coast Guard rule states that while no individual may be compelled to provide specimens for alcohol and drug testing required after an SMI, "refusal to provide specimens is a violation of this subpart and may subject the

individual to suspension and revocation proceedings under part 5 of this chapter, a civil penalty, or both." 46 C.F.R. § 4.06–5(d).

Under the regulations, individuals may refuse to submit to a mandatory chemical test following an SMI, but the Coast Guard may impose penalties for such refusal. See 46 C.F.R. § 4.06-5(d) ("No individual may be compelled to provide specimens for alcohol and drug testing required by this part" but refusal is a violation and can result in adverse administrative proceedings and/or a civil fine); 33 C.F.R. § 95.040 (refusal is admissible in administrative proceedings). See also United States v. Hutchinson, No. 2:16-CR-168-DBH, 2018 WL 447619, at *4 (D. Me. Jan. 17, 2018), appeal dismissed, No. 18-1137, 2018 WL 3954202 (1st Cir. July 25, 2018).

Accordingly, the Coast Guard must establish by a preponderance of the evidence that (1) an SMI occurred aboard the M/V MALASPINA, (2) Respondent was an individual employed on board the M/V MALASPINA, (3) she was determined to be directly involved in the SMI, (4) her marine employer directed her to provide a urine specimen for chemical testing, and (5) she failed to appear for that test within a reasonable time after being directed to do so by the employer.

**D. Respondent's Injury was a Serious Marine Incident**

The Coast Guard argues Respondent's injury constituted a SMI because "Respondent admitted she was involved in an SMI, both in her response to the Coast Guard's allegations and through her testimony at the hearing." CG Brief at 4. The Coast Guard erroneously asserted in its brief that Respondent's injury "required immediate transfer off of the vessel to seek medical attention and Respondent ultimately required surgery and paid leave for three months following the injury." CG Brief at 4. This claim is contrary to all the evidence in the record. Respondent was responsible for securing her own transportation away from the ship at the next routine port of call. [Tr. at 86-87]. She sought medical attention approximately a week after the incident and

was diagnosed with a medial collateral ligament tear, and the only treatment she eventually received for the injury was a course of physical therapy and chiropractic treatment. [Tr. at 139]. Respondent received worker's compensation until she returned to duty at the end of January 2019. As of the date of the hearing, she continued to receive physical therapy. [Tr. at 140].

Respondent did not specifically argue that her injury should not be considered an SMI, but maintained none of her job classifications required her to know what constituted an SMI. Furthermore, she had never heard the terminology used prior to this proceeding. Resp. Brief at 3. Regardless of any admissions Respondent made, I must independently consider whether the facts surrounding her injury establish it as an SMI. See Appeal Decision 2690 (THOMAS).

*1. Regulatory Authority: Serious Marine Incidents*

The Coast Guard has regulatory authority to investigate SMIs under 46 C.F.R. Part 4. Individuals who are "determined to be directly involved" in an SMI are mandated to provide "a blood, breath, saliva, or urine specimen for chemical testing when directed to do so by the marine employer or a law enforcement officer." 46 C.F.R. § 4.06-5(a). Marine employers are charged with ensuring that this drug and alcohol testing is conducted following the SMI. 46 C.F.R. § 4.06-3. Alcohol testing must take place within two hours of the incident, and drug testing within 32 hours, unless an exception applies.

An individual is considered "directly involved" in an SMI if his or her action or failure to act "is determined to be, or cannot be ruled out as, a causative factor in the events leading to or causing a serious marine incident." 46 C.F.R. §§ 4.06–1 to 4.06–60); Transportation Inst. v. U.S. Coast Guard, No. CIV. A. 88-3429, 1989 WL 222493, at *2 (D.D.C. Aug. 3, 1989). Among other things, an SMI may involve an injury "which requires professional medical treatment beyond first aid, and, in the case of a person employed aboard a vessel in commercial service, which renders the individual unfit to perform routine vessel duties." 46 C.F.R. § 4.03–2.

Thus, the Coast Guard must prove by a preponderance of the evidence that Respondent's injury met the definition in § 4.03–1 by both requiring professional medical treatment and rendering Respondent unfit to perform routine vessel duties. See Martin v. SMAC Fisheries, LLC, No. 3:11-CV-00012-JWS, 2012 WL 2554251, at *6 (D. Alaska Mar. 1, 2012), report and recommendation adopted in part, No. 3:11-CV-00012 JWS, 2012 WL 1424533 (D. Alaska Apr. 23, 2012).

*2. Respondent Received Medical Treatment Beyond First Aid*

Coast Guard regulations do not define what constitutes "first aid." However, under Navigation and Vessel Inspection Circular 01-15 (NVIC 01-15), the Coast Guard uses the Occupational Safety and Health Administration (OSHA) definitions and explanations of "medical treatment" and "first aid" found in 29 C.F.R. § 1904.7(b)(5). Under the OSHA regulations, "medical treatment" means the management and care of an injury but does not include visits to a physician or other licensed health care professional solely for observation or counseling, diagnostic procedures such as x-rays and blood tests, or first aid. "First aid" includes, among other things, use of non-prescription medications at their normal strength, use of non-rigid supports such as elastic bandages and wraps, and hot or cold therapy. 29 C.F.R. § 1904.7(b)(5)(ii)(A), (E), and (F). However, for recordkeeping purposes, physical therapy and chiropractic treatments are considered medical treatment. 29 C.F.R. § 1904.7(b)(5)(ii)(M).

This case presents a relatively novel issue of timing, though. An instance where additional medical treatment is provided immediately after an injury would clearly constitute an SMI. However, if the mariner does not require or receive urgent medical treatment, the determination of whether the incident is "likely to become" an SMI is necessarily subjective and is left to the employer. The Coast Guard's regulations do not contemplate the effect of a delay in medical attention on an injury's classification as an SMI. Further, I was unable to find any

conclusive legal precedent. In a case entitled Martin v. SMAC Fisheries, 2012 WL 2554251 (D. Alaska 2012), the magistrate judge ruling on a motion for summary judgment determined the plaintiff's several-day delay in obtaining additional medical treatment after an on-board accident constituted "an issue of material fact as to whether the delay in seeking medical attention effects the qualification of the injury under § 4.05–1." See SMAC Fisheries at *7. However, there was no decision issued on the merits of that case.

AMHS's policy is to assume anyone who leaves a ship due to an injury will receive additional medical treatment because there is more downside to the company in failing to order chemical testing if the injury turns out to be a serious marine incident than in subjecting employees to testing that is ultimately unnecessary. [Tr. at 90-91]. Here, the record is clear that the only care Respondent received immediately after her fall was a bag of ice for her knee, which is considered first aid. She did not seek or receive any other medical care for approximately a week, which was well after the 32-hour drug testing window had passed. Although AMHS did not arrange for medical personnel to come on board to evaluate Respondent, a transfer to a medical facility, or even transportation away from the ship after she disembarked at the next port of call, Ms. Gregoratos provided paperwork for claiming workers' compensation and gave Respondent a personal recommendation to an orthopedic surgeon in Juneau. [Tr. at 60, 86]. Thus, it is reasonable that AMHS personnel determined Respondent's injury was likely to require some sort of medical treatment beyond first aid.

*3. Respondent was Unfit for Duty as a Result of her Injury*

The parties do not dispute that Respondent was ultimately deemed unfit for duty after her injury. The treatment she eventually received included a course of physical therapy and chiropractic treatment, and she was unable to return to work for more than three months. [Tr. at 139]. While the record contains no medical evidence about whether Respondent's ligament

would have ultimately healed on its own, she testified that this type of injury "has a pretty good success rate of rectifying itself without surgical intervention with aggressive physical therapy." [Id.].

I find the Coast Guard has shown Respondent's injury was a serious marine injury under 46 C.F.R. § 4.03–2.

**E. AMHS did not Properly Order a Drug Test**

The fact that Respondent did not submit to a drug test within 32 hours of her injury is not in dispute. Thus, the remaining issues I must consider are: 1) whether Respondent was properly notified of such a test; and, if so, 2) whether her failure to appear at the collection facility and take the drug test within 32 hours of the injury constitutes a refusal under 49 C.F.R. § 40.191(a)(1) and 46 C.F.R. Part 16 and a violation of 46 C.F.R. § 4.06-5(a). If so, it would establish a violation of law or regulation as described by 46 U.S.C. § 7703(1)(A) and defined by 46 C.F.R. § 5.33.

The Commandant considers the reason for ordering chemical testing to be part of the Coast Guard's prima facie case. Appeal Decision 2704 (FRANKS), 2014 WL 4062506, at *6 (2014), citing Appeal Decision 2633 (MERRILL) (2002). Thus, the ALJ is required to consider whether the drug test itself was properly ordered under the regulations. FRANKS at *7; see also Appeal Decision 2697 (GREEN) (2011). The Coast Guard argues, "Respondent was directed by her marine employer, through the purser onboard the MALASPINA, Ms. Gregoratos, to immediately submit for substance screening." CG Brief at 4. Respondent argues she was not directly told where or when to report and did not learn of the need to test until she found the paperwork a week later. Resp. Brief at 4-5.

There is no question that marine employers are permitted to carry out drug testing exceeding the requirements of 46 C.F.R. Part 16. See FRANKS, 2014 WL 4062506, at * 9. Ms.

Gregoratos testified AMHS's policy is to test all crew members who leave the ship due to an on-the-job injury, and AMHS is within its rights as a marine employer to have such a policy. In this proceeding, however, the Coast Guard did not charged Respondent with failing to follow a company directive, but rather with a violation of law or regulation for failing to take a test mandated by 46 C.F.R. § 16.240 and 46 C.F.R. § 4.06-5. Thus, the Coast Guard is required to establish that the drug test was properly ordered. See FRANKS at *10.Neither DOT nor Coast Guard regulations specifically provide the method by which employers must notify employees that they must take a drug test. "Therefore, as long as an employer's policy with respect to notification is in accord with the applicable DOT and Coast Guard regulations, the form and manner of notification may be left to the employer's discretion." Appeal Decision 2652 (MOORE) (2005), aff'd sub nom. Collins v. Moore, NTSB ORDER NO. EM-201 (August 30, 2005).

There is scant case law interpreting whether an employer gave effective notification to an employee who fails to report for a drug test, and the findings are necessarily limited to the specific facts of the case. See MOORE (mariner received actual notice when a third-party administrator left a voicemail telling him to report to a specific facility within 24 hours for DOT-required drug testing); Appeal Decision 2690 (THOMAS) (2010) (Commandant affirmed ALJ finding that the respondent "was directed by his marine employer to submit to a post-SMI chemical drug test…in a clear, unmistakable and unambiguous manner").

It stands to reason that an effective order must be reasonably clear and unambiguous about the employee's duties and responsibilities regarding a drug test. This accords with other instances where a mariner allegedly failed to obey a lawful order. See, e.g., Appeal Decisions 2357 (GEESE) (1984) (considering whether the mariner "would have easily understood" the nature of the order); 2056 (JOHNSON) (1976) ("If the Master could not be certain that what he said should have been construed as an order I cannot see imposing upon the Appellant a higher

level of understanding. It seems to me that a sufficient degree of specificity and certainty on the part of the individual who claims to have given the order is required before elements . . . of the offense can properly be satisfied."). I see no reason why the standards governing a lawful order to take a drug test should differ from those governing other lawful orders to a mariner from his or her superior.

I previously considered the issue of whether an employer properly notified an employee about a Part 16 drug test in U.S. Coast Guard vs. Edenstrom, Docket 2015-0352 (January 12, 2017), where I found that proper notification under 49 C.F.R. Part 40 requires an employer to tell an employee not only that he or she has been selected for testing, but also the details regarding the location of the test and the time for reporting to the testing facility.[1] I also found that neither 49 C.F.R. Part 40 or 46 C.F.R. Part 16 establishes a duty on the part of a mariner to cure an employer's flawed notification.

The Coast Guard argues, "this case is unlike [Edenstrom] because the respondent was properly notified of the details regarding the location of the test and the time for reporting to the testing facility." Respondent disputes this, stating she was never informed of the need to take a drug test within any specific time period.

In Edenstrom, the employer notified the mariner that he and the other crew members would be required to take a drug test, but did not properly notify him of the time and place of the test. Here, in contrast, there is evidence Respondent received a referral form containing details about the location and time of the test together in a packet with other paperwork unrelated to the drug test. The question is whether Ms. Gregoratos adequately called her attention to the need to test and put her on notice that she was obligated to follow the instructions on the referral form.

[1] The Coast Guard appealed my decision but later sought to withdraw its appeal. As of the date this Decision is issued, the Commandant has not yet issued an order granting the motion to withdraw.

*1. AMHS's Actions are at Odds with its Written Policy*

The AMHS policy on post-accident drug and alcohol testing allows specimen collection to occur either aboard the ship or in another designated location. [CG-05 at 50]. It states, "When an employee involved in an SMI is injured, the employee's safety is AMHS's first concern. When AMHS is unable to chemically test any employee *due to a medical evacuation or other exceptional circumstance,* AMHS may utilize a Service Agent for purposes of chemically testing employees." [Id. at 51 (emphasis added)]. In this instance, Ms. Gregoratos conducted alcohol testing aboard the vessel, but did not collect a urine specimen for drug testing. It is not clear that going ashore at the next scheduled stop would constitute a medical evacuation, nor was there another extraordinary circumstance preventing her from collecting a urine specimen on board the ship. However, Ms. Gregoratos testified they are "actually advised not to do the drug testing onboard if possible since we don't have much experience." [Tr. at 88].

Thus, although AMHS's written policy seems to call for all chemical samples to be obtained onboard the ship whenever possible, in actual practice the company appears to utilize in-port testing facilities instead. While this is permissible under the regulations, the discrepancy could reasonably lead to confusion among the company's employees.

*2. AMHS Personnel Did Not Give Respondent a Verbal Order to Report for Drug Testing*

Under AMHS policy, if an in-port collection facility is utilized, crewmembers "must report immediately to the collection facility for collection and testing, as notified by the Master or his/her representative" and no crewmember involved in a SMI may leave the vessel without the express permission of the Master or Master's representative. [Id.] While considerably more detailed than the regulations, this AMHS policy is consistent with Coast Guard drug testing requirements following serious marine incidents in 46 C.F.R. Subpart 4.06.

The documentary evidence I find relevant to the notification issue consists of: the note Ms. Gregoratos provided Respondent before she departed the vessel; Ms. Gregoratos's notes and statement to investigators; an unsworn statement from Brandy Richter, the Third Engineer aboard the MALASPINA at the time of the incident and the AMHS policy on SMI testing in exhibit CG-05 at 36-63 (2018 Revision); and the drug testing referral form. The testimonial evidence comes only from Ms. Gregoratos and Respondent, as neither party called any other witnesses to describe what they saw or heard that day. Their accounts conflict in several key ways, and I must therefore assess the relative credibility of their testimony, and the evidence as a whole.

In Coast Guard suspension and revocation proceedings, "[t]he ALJ has broad discretion in determining the credibility of witnesses and in resolving inconsistencies in the record; 'where there is conflicting testimony, it is the function of the ALJ, as fact-finder, to evaluate the credibility of witnesses and resolve inconsistencies in the evidence.'" Appeal Decision 2711 (TROSCLAIR) (2015) (quoting Appeal Decision 2616 (BYRNES) (2000)). This is because the ALJ "can fully observe the response, character and demeanor of the witnesses in issue." Appeal Decision 2519 (JEPSON) (1991). Some factors traditionally involved in a credibility determination include:

> (1) the demeanor of the witness, (2) the inherent plausibility of the witness's testimony, (3) the consistency of the testimony of the witness with prior statements of the witness, (4) the internal consistency of the witness's statements, (5) the consistency of the testimony with other evidence, (6) the accuracy of the witness's testimony, and (7) the interest of the witness in the outcome of the proceeding. Other factors may also apply but a credibility assessment is commonly made based on the totality of the circumstances after considering any relevant fact that may impact the witnesses [sic] credibility.

St. Claire Marine Salvage, Inc. v. Bulgarelli, No. 13-10316, 2014 WL 3827213, at *6 (E.D. Mich. Aug. 4, 2014), aff'd (6th Cir. 14-2135) (July 22, 2015). The essence of credibility is

whether the testimony in the record is well-supported and believable; "[t]he presence of evidence which conflicts with the testimony of a witness is not, in itself, enough to conclusively show a lack of credibility of that witness when there is substantial evidence that supports his account." Appeal Decision 2017 (TROCHE) (1975).

Ms. Gregoratos gave Respondent a note on September 19, 2018, detailing the steps Respondent needed to take after departing the vessel; however, the note said nothing about drug testing. [R-A]. Ms. Gregoratos contended the list was never meant to be exhaustive and they don't generally do that for people, but she was trying to be helpful. [Tr. at 65, 77]. During the hearing, the Coast Guard asked:

> Q. Ms. Gregoratos, you said that the note that you provided to Ms. Palma was not a complete list. How would she know that that was not a complete list?
> A. Well, she knows --
> Q. Did you hand her any other documentation?
> A. Not in the engine room. I didn't have anything with me.

[Tr. at 79]. Since the Coast Guard did not permit Ms. Gregoratos to complete her answer or pose a similar question to Respondent, I cannot find that Respondent should or did know the note was not an exhaustive list of the actions she was required to take.

A summary of the interview LT Herring, the Coast Guard Investigating Officer, conducted with Ms. Gregoratos during the course of the investigation is in evidence. [CG-13]. The summary reflects that Ms. Gregoratos told him, "I was very clear with Jessica about doing a drug test. I told her multiple times that she had to do it (the drug test) in Juneau or Ketchikan that day." [Id. at 2]. Ms. Gregoratos also made notes summarizing her interview, which are in evidence. [R-C].

Ms. Gregoratos also wrote an email to LT Herring dated October 17, 2018, in which she stated that the Third Engineer, Brandy Richter, may have heard her tell Respondent about the drug test while in the engine room. [CG-11]. Ms. Gregoratos wrote that she had shown Respondent each piece of paper in the manila envelope and explained what they were while they

were seated in the ADA van. Further, when Respondent asked if she could take the drug test in Ketchikan, Ms. Gregoratos told her "it would be better if she had it in Juneau, that is was still before 0600 and that she had enough time" and gave her explicit directions to the Juneau testing facility. [Id.]

In rebuttal, Respondent entered into evidence an unsworn statement from Ms. Richter, the Third Engineer, who said she was present and actively involved in managing the situation in the engine room. Ms. Richter wrote, "I witnessed the Purser, Katherine give Jessica an alcohol test right after the incident. However, while passing her the packet of what she needed to complete once she got off the vessel, there was no mention of a drug test that needed to be performed within a specific time constraint or at all for that matter." [R-B].

There is no dispute that Ms. Gregoratos included the drug testing referral form in the manila envelope, but Respondent explains she did not realize the form was there until she found it at her first medical appointment a week later. The referral form AMHS was using at the time did not require the mariner to acknowledge receipt. However, Respondent presented evidence that AMHS has now added an acknowledgment line for the employee to sign and date, showing the employee actually received and was aware of the referral. [R-J; Tr. at 119; 143-44]. Respondent stated she pursued this change because she felt what happened to her was unfair and did not want it to happen to others in the future, and Mr. Karvales agreed this case was a major factor in the redesign of the form. [Tr. at 143-44]. The redesign also aligns with the Coast Guard's Marine Safety Advisory entitled *Random Chemical Testing Requirements for Marine Employers, Sponsoring Organizations and Mariners* (June 29, 2016), which strongly recommends that employers obtain some form of written acknowledgment when ordering a drug test.[2]

[2] A written signature, email, or text message all appear to suffice under the recommendations.

In assessing Ms. Gregoratos's demeanor at the hearing, I found her somewhat evasive and hesitant to make any definite statements about what happened on the day of the incident. Her testimony conflicted in significant ways with the notes and interview summary. Specifically, under oath Ms. Gregoratos testified she could not remember whether she told Respondent she was required to take a drug test at the time she administered the alcohol test, while they were still in the engine room. [Tr. at 61]. Ms. Gregoratos also testified that when she found Respondent in the van and gave her the manila envelope, she pulled the forms out partway and said the name of each but didn't review them in depth because there wasn't enough time, partially contradicting her email to LT Herring. [Tr. at 63; Ex. CG-11]. She recalled having a short conversation about drug testing in which she recommended Respondent go in Juneau because she had time before her flight, but said Respondent could go in Ketchikan if she preferred. [Id.] She explicitly stated they did not discuss the testing timeline, contradicting her written notes and statements saying she told her to go that day. [Tr. at 80].

Ms. Gregoratos believed her notes, which she made closer to the date of Respondent's injury, were probably a better indicator of what happened than her testimony. It is plausible that a person's memory would fade as time passes, though I note the hearing took place only seven months after the incident. Nevertheless, I find it appropriate to give greater weight to testimony given under oath than to unsworn statements.

Finally, while Ms. Gregoratos does not appear to have any personal interest in seeing Respondent sanctioned as part of this proceeding, she remains an employee of AMHS and is subject to the company's policies. She testified that the company has a policy of ordering drug testing for all employees leaving the ship due to injury, and thus has an interest in showing that her own actions that day did not go against company policy.

Respondent, on the other hand, clearly has a vested interest in the outcome of the proceedings, as they affect her livelihood. Nevertheless, on the balance, I found her to be a more

credible witness than Ms. Gregoratos. Respondent's demeanor at the hearing was straightforward, and her version of events was internally consistent throughout the proceeding. In her opening statement, Respondent said her recollection of the conversation with Ms. Gregoratos was that "Juneau versus Ketchikan was in reference to the orthopedic facility in Ketchikan rather than Juneau and not the drug testing since it's easier obviously and makes more sense to establish care where I live." [Tr. at 103]. Respondent later testified that she was not aware of the need to take a drug test until she found the referral form in the manila envelope a week later. While her testimony contradicts Ms. Gregoratos's, it is not inherently implausible.

I have also considered the fact that Respondent took a urinalysis drug test on September 26, 2018, which supports her testimony that she tested immediately upon finding the form in the manila envelope. [R-D at 8]. I have also considered the hair test she took on October 2, 2018, which was negative for drug use over a longer time period than the urinalysis test would have covered.[3] [R-E]. I find it unlikely Respondent would have submitted on her own initiative and at her own expense to hair follicle testing if she had knowingly refused to take a timely urinalysis test.

I find Ms. Gregoratos's testimony does not credibly establish whether she gave Respondent a direct order at either the engine room or ADA van to take the test at the Tongass facility in Juneau within a certain time frame. In particular, I note the portion of Ms. Gregoratos's testimony where she said, "that's something that I assume everybody knows . . . that people know after an accident they're going to go take a drug test. I assume people know that. Whether they do or not, I don't know. But that's what I assume, that as a crew member you would already know that. But I don't assume that you know the timeline." [Tr. at 78]. Based on these statements, Ms. Gregoratos may not have realized the specific details she needed to give

Respondent in order to effectively direct a Part 16 drug test. However, even though Ms. Gregoratos said that she doesn't assume crewmembers know the timeline for testing, she later testified she and Respondent "did not discuss a timeline, per se" on September 19, 2018. [Tr. at 80].

The note Ms. Gregoratos provided Respondent along with the manila envelope was also a likely source of confusion, since it specifically enumerates tasks for Respondent to do but does not mention reporting for drug testing or contacting a Service Agent to schedule a drug test. I give the note significant weight, as it is contemporaneous evidence of the topics Respondent and Ms. Gregoratos were discussing. While it does not conclusively prove whether Ms. Gregoratos discussed drug testing or not, it tends to show she was more focused on other tasks such as visiting a doctor and filing a workers' compensation claim.

I also find Respondent's argument that she thought they were discussing locations for follow-up medical care, not drug testing, to be reasonable—particularly in light of Ms. Gregoratos's testimony that, while Respondent seemed to understand what they were discussing, she "was hurt, injured/hurt and everything that goes along with that. You know, as sharp as someone can be at that time." [Tr. at 67]. If Ms. Gregoratos believed Respondent was not "as sharp" as she might otherwise be, it was particularly important for her to give a clear and unambiguous order.

I have taken into consideration Ms. Gregoratos's emphatic statements to the company and the Coast Guard investigators that she ordered Respondent to test that day in Juneau, which directly conflict with her testimony that she told Respondent it was okay to test in Ketchikan and did not give a specific timeline, and give greater weight to her testimony under oath at the hearing. I believe Ms. Gregoratos intended to direct Respondent to take a drug test, but never

[3] Although hair testing is not a permissible method for DOT drug tests, the Coast Guard has recently been willing to accept them as other evidence of drug use or non-use. See USCG v. McPherson, ALJ Docket No. 2013-0434; USCG

framed it with "a sufficient degree of specificity and certainty" to effectuate an order. See JOHNSON at *2.

*3. Respondent Was Not Otherwise on Notice of the Need to Test*

The Coast Guard also attempted to show Respondent's failure to look at the referral form sooner was unreasonable because she knew or should have known about the testing requirements by virtue of her drug and alcohol training at AMHS. This argument hinges on whether Respondent knew she was directly involved in an SMI, as the employee's independent obligation to undergo required chemical testing arises only after the marine employer has determined the marine casualty is, or is likely to become, an SMI. Specifically, the responsibility to test shifts to the employee to provide a sample "when directed to do so by the marine employer or a law enforcement officer." 46 C.F.R. § 4.06-5(a). However, neither 49 C.F.R. Part 40 nor 46 C.F.R. Part 16 establish any duty on the part of a mariner to cure an employer's flawed notification.

The Coast Guard called Mr. Karvelas to testify about Respondent's training in AMHS's substance policies, which she received during her orientation after she was hired. [Tr. at 24-36]. He believed Respondent was aware of the drug and alcohol policies, including those pertaining to serious marine incidents. [Tr. at 34, 39].

Respondent presented rebuttal evidence from Krissel Calibo, who is a patrolman for the inland boatman's union. Ms. Calibo testified that during the new employee orientation, the focus is mainly AMHS's zero tolerance policy and random drug testing requirements. She testified that AMHS does not consistently enforce the post-incident testing requirement, as she personally had injuries requiring medical treatment beyond first aid in 2010 and again in 2014 or 2015, and was not asked to take a drug test either time. [Tr. at 117, 121]. She stated that, in her union capacity, she represented several mariners who did not complete drug testing after a serious marine

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incident. [Tr. at 118]. She testified she is frequently approached by AMHS employees who are uneducated about the policy and "if it's that many people, it can't be everyone that's – just because they haven't taken the initiative to find out." [Tr. at 125].

The AMHS drug and alcohol policy clearly states that employees who are required to test after an SMI must take an alcohol test within two hours and a drug test within 32 hours of the incident. [CG-05]. However, AMHS's standing orders to pursers are that if crewmembers "are injured or hurt and they're going to be getting off the boat, they're going to miss time at work, then we are to assume they are going to get more than first aid treatment. We're to assume that's a serious marine incident." [Tr. at 89]. Ms. Gregoratos testified, "If we make the mistake of not referring them when they should have been referred, I understand that's even worse than referring them when they shouldn't have been referred." [Tr. at 91].

This characterization of the employer's responsibilities does not accord with the Commandant's reasoning in FRANKS:

> Ignoring compliance with Part 16's prerequisites for testing would expose mariners to potentially unreasonable government action, through employers' testing practices apparently pursuant to the Coast Guard regulatory regime, without any practical recourse. Unreasonable drug testing undertaken by employers under the umbrella of the Coast Guard regulatory regime also risks judicial invalidation of the entire drug testing regime, which would be inimical to marine safety, the core interest underlying the regime.

2014 WL 4062506 at *7. The Coast Guard does not require drug testing for all shipboard injuries, only those that are, or likely to become, an SMI. See, e.g., Pariseau v. Capt. John Boats, Inc., No. CIV.A. 09-10624-JGD, 2012 WL 527652, at *13–14 (D. Mass. Feb. 16, 2012); Newill v. Campbell Transp. Co., No. 2:12-CV-1344, 2015 WL 222438, at *1 (W.D. Pa. Jan. 14, 2015).

Even a mariner who is thoroughly familiar with AMHS's policy would not know the testing requirements had been triggered unless AMHS informed them the incident was considered an SMI. There is no evidence that Ms. Gregoratos or anyone else in Respondent's

chain of command told her the incident was being reported as an SMI at any point during the 32-hour testing period. There is also no evidence that non-officer AMHS crewmembers such as Respondent knew it was the company's policy to treat all instances where a crewmember leaves the ship due to injury as SMIs. Respondent argued she was not aware of the term "Serious Marine Incident" prior to this proceeding. Thus, even accepting that Respondent received training about the 32-hour timeline for drug testing after an SMI, I find no evidence that she did, or should have, known this requirement applied to her on the date and time in question.

In any event, the obligation for a mariner to submit to testing under 46 C.F.R. § 4.06-5(a) arises only after proper direction from the marine employer or law enforcement. Without knowing she was an individual determined to be directly involved in an SMI, Respondent had no reason to believe that she was required to take a drug test mandated by 46 C.F.R. Part 16. Likewise, AMHS's written policy predicates the employee's duty to test on the determination that they were directly involved in an SMI. Since the Coast Guard has not proved that anyone communicated to Respondent that that her injury was an SMI and had not given her proper direction to test, I conclude she was not on notice of any obligation to test.

## IV. ULTIMATE CONCLUSIONS OF LAW

After carefully considering all the evidence in the record, I conclude:

1. Respondent's injury occurred while she was acting under the authority of her MMC, thus I have jurisdiction over this matter.

2. Respondent's injury was a Serious Marine Incident.

3. AMHS personnel did not give Respondent a clear and timely order to take a post-casualty drug test, thus the Coast Guard failed to meet its burden of showing Respondent was properly directed to take a drug test within 32 hours of the September 19, 2018, SMI.

4. Respondent did not have an independent obligation to submit to a drug test because AMHS personnel did not inform her the incident was being considered an SMI and did not give her proper direction to test.

Accordingly, I need not reach the issue of whether her failure to appear for testing constitutes a refusal under 49 C.F.R. § 40.191(a)(1) and 46 C.F.R. Part 16. I find the Coast Guard's allegation **NOT PROVED**.

## ORDER

Having found the Allegation in the Complaint of Violation of Law or Regulation **NOT PROVED**, this proceeding is dismissed with prejudice in accordance with 46 C.F.R. § 5.567(a).

**George J. Jordan**
**US Coast Guard Administrative Law Judge**

Date: January 09, 2020